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* My academic title and affiliated institution are given only for the purpose of identification. The views expressed here are not necessarily those of the University of Missouri-Columbia.

Testimony of Professor Carl H. Esbeck:

The attention being given to section 175(c) of the National and Community Service Act (42 U.S.C. § 12635(c))[1] is but of a piece of a larger fabric, the whole cloth being widely known as the Bush Administration's Faith-Based and Community Initiative. On the question of religious staffing rights of faith-based grantees, the President has been clear on his position. For example, on April 4, 2002, when appealing for support for faith-based legislation, President Bush said, "people should be allowed to access that money without having to lose their mission or change their mission."[2] Again, when announcing on December 12, 2002, two new Executive Orders in support of the Faith-Based and Community Initiative, he said, "faith-based programs should not be forced to change their character or compromise their mission."[3] If President Bush's goal is to protect the mission integrity of faith-based charities as they reach out to the poor and needy, including the right to choose staff of like-minded faith, then consistency requires that his Administration do likewise by seeking to amend section 175(c).

Religious nonprofit organizations that provide welfare services to the poor and needy have the legal right to staff (hire, promote, and discharge) on a basis that takes into account the organization's religious beliefs and practices. That right ought not to be lost when an organization becomes a recipient of federal financial assistance.

1. IN THE CAUSE OF RELIGIOUS FREEDOM, CONGRESS DECIDED TO PROTECT RELIGIOUS STAFFING RIGHTS WHEN IT AMENDED SECTION 702(A) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

Title VII of the Civil Rights Act of 1964[4] prohibits employment discrimination on the bases of race, color, religion, sex, and national origin. The legislation initially applied to employers with 25 or more employees. The law was binding on religious organizations as well, at least insofar as Title VII prohibited employment discrimination on the bases of race, color, sex, and national origin. Religion was different. Pursuant to section 702(a), religious organizations were not subject to charges of religious discrimination brought by employees with religious responsibilities.[5] The 1964 act was amended by the Equal Employment Opportunity Act of 1972,[6] which among other changes increased the coverage of Title VII by making it applicable to employers with 15 or more employees. More importantly, 702(a) was broadened in its scope. With passage of the 1972 act, religious organizations were free of all charges of religious discrimination by any applicant or employee, regardless of whether the nature of the job in question entailed religious responsibilities or tasks.[7]

The 1972 act broadened 702(a) out of a concern that government regulators not be able to interfere with the religious affairs of religious organizations.[8] The congressional sponsors of the 702(a) amendment, Senators Allen and Ervin, couched its purpose in terms of a restraint on government power, thus keeping the desired distance between church and state. Senator Sam Ervin, a Democrat from North Carolina who was widely recognized as an expert on the Constitution, said of his proposal:

[T]he amendment would exempt religious corporations, associations, and societies from

> the application of this act insofar as the right to employ people of any religion they see fit is concerned. . . .
>
> . . . In other words, this amendment is to take the political hands of Caesar off the institutions of God, where they have no place to be.[9]

For government regulators and, ultimately, the courts to have the power to pry into job descriptions, allocation of job assignments, lines of supervisory authority, and performance reviews at religious institutions, and to sift and sort as to the nature and degree of "religious" character as distinct from "secular" character for any given employment position, invites untoward government involvement with religious questions.[10] If the Establishment Clause deregulates the religious sphere, which it does, then there can be no jurisdiction in the government to determine which of a faith-based organization's [FBO's] jobs are "secular enough" to regulate and which are "too religious" to be overseen by government officials.[11]

A later court challenge in *Corporation of the Presiding Bishop v. Amos*,[12] took up the question of whether 702(a) was a "preference" for religious employers over secular employers. Without a single dissenting vote, the U.S. Supreme Court upheld the 1972 amendment that broadened 702(a).[13] What Congress did by passing 702(a) was to refrain from imposing a regulatory burden on religion, even though the burden was imposed on secular employers similarly situated. And it is elementary that the government does not "make [a] law respecting an establishment of religion" by leaving it alone.[14] As the Supreme Court observed:

> A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden "effect" under [the Establishment Clause], it must be fair to say that the *government itself* has advanced religion through its own activities and influence.[15]

Indeed, to have failed to open up the scope of 702(a) would likely have risked the narrower, pre-1972 version of 702(a) being challenged as inviting excessive entanglement between church and state. The highest court in Maryland has since handed down a ruling much to that effect.[16] The court sustained a constitutional challenge by a religious k-12 school to a county employment nondiscrimination ordinance. The school was sued when it dismissed two teachers because they were not members of the sponsoring church. The ordinance's accommodation for religious staffing by religious organizations, which was for jobs with "purely religious functions," was found too narrow, thereby inviting encroachment on the school's religious autonomy. Similarly, at one time the Federal Communications Commission (FCC) required radio stations owned by religious organizations not to discriminate in employment on the basis of religion. There was an exemption, but it was only for those jobs that had no substantial connection with a station's program content. Realizing that enforcement of the regulation interfered with the religious autonomy of these radio stations, in late 1998 the FCC announced that it would henceforth permit religious staffing as to all employees at a radio station.[17]

At this juncture, opponents of the President's Faith-Based Initiative make a rather supercilious argument. They chide supporters with questions like, "If your FBO is a Catholic

soup kitchen, what difference does it make that a Baptist is hired to ladle the soup?" Similarly, "If you have a Lutheran homeless shelter, why can't a Jewish individual be just as effective in providing a clean bed to street people?" The argumentation is reductionist, paring down a faith-driven ministry to the mere provision of bread and beds. Writing separately in *Amos*, Justice William Brennan supplied these critics with the right response, one that more fully recognizes the rich and variant nature of what it means to be a faith community and that does justice to the spiritual prompting that motivates religious people to seek employment in a helping ministry:

> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.
>
> . . . [W]e deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities.[18]

The desire by FBOs to employ those of like-minded faith is not inconsistent with the prohibition against direct government funds being diverted to activities such as proselytizing and worship. To employ only those of like faith does not mean that those same employees will be pressed into performing forbidden tasks when using public grant monies.[19] There is no contradiction in an organization, one of thoroughgoing religious *character*, that, in compliance with the law, refrains from engaging in practices of inherently religious *content*. This is an everyday occurrence. Groups that are more evangelistic can still worship or preach, they just must do so separated in time or location from their government-funded program.[20] Still other FBOs may, out of their faith, want to serve without any obvious evidence of religion because they understand their missionary call to entail outward neutrality when it comes to the symbols, sayings, and other externalities of the faith. As the California Supreme Court recently observed of a Catholic hospital that fired an employee for "soul saving" on the job, "[M]aintaining a secular appearance in its medical facility that is welcoming to all faiths, thereby de-emphasizing its distinctively Catholic affiliation, appears to be part of [the hospital's] religiously inspired mission of offering health care to the community."[21] New empirical data, which just recently has become available, shows that employees at FBOs are properly following the Court's first amendment interpretation prohibiting the diversion of direct public funding to inherently religious activities.[22]

Opponents of the Faith-Based Initiative concede, as they must after the decision in *Corporation of the Presiding Bishop v. Amos*, the applicability and constitutionality of 702(a) to religious social service providers. But, they argue, 702(a) is somehow waived if an FBO applies for and is awarded a social service grant. Every court to rule on this argument has rejected it.[23] When an FBO does staff on a religious basis, such as requiring good standing in a particular

church or doctrinal agreement with a particular moral teaching, the FBO's conduct is not within the scope of Title VII and thus is lawful. **It is not that religious staffing is unlawful but excused when the FBO falls back on 702(a). Rather, the conduct, in the first instance, is simply lawful. Because Title VII does not at all reach the conduct of religious staffing, the courts have said that no act or omission by the FBO could alter the Civil Rights Act so as to expand its scope to religious staffing. Only Congress can do that.**[24] **This widely adopted interpretation of Title VII would also apply to an FBO receiving government funds for a specific social service program wherein the challenged religious staffing is taking place, indeed, even for a job position made possible only by the government grant in question.**

II. PROTECTING THE STAFFING RIGHTS OF FUNDED FAITH-BASED SOCIAL SERVICE PROVIDERS DOES NOT VIOLATE THE FIRST AMENDMENT.

A. The "State" or "Federal Action" Requirement

Opponents to the Faith-Based Initiative argue that for a funded FBO to invoke 702(a) would violate that Establishment Clause. This makes no sense. What 702(a) does is keep government out of the business of religion, thereby honoring the Establishment Clause, not violating it. **That is why 702(a) was amended in 1972—to "take the political hands of Caesar off the institutions of God, where they have no place to be," as Senator Sam Ervin said.**

The opponents of the Faith-Based Initiative suppose a direct link between the government's decision to award a competitive social service grant and a non-governmental provider's employment practices. But t**he purpose of the grant funding is not to create new jobs or to induce certain employment practices thought desirable by the government. Rather, the object of the government's welfare program is the funding of social services for the poor and needy. Whether or not a social service provider has employment policies rooted in its religious mission is probably not even known to the government. However, whether known or not, it is the non-governmental provider that is making the staffing decisions, not the government. It is elementary that the Bill of Rights, including the Establishment Clause, was adopted to restrain the government and only the government. Hence the Establishment Clause cannot be violated in the absence of an act or actions by the government.**[25]

Not all FBOs staff on a religious basis, and some that do so only use such criteria in selecting ministerial and other policy-forming or executive-level employees. Because there is no causal link between a social service grant and the employment practices of a grantee, an FBO's religious staffing decisions are not "state action" under the Fourteenth Amendment or "federal action" under the Fifth Amendment. In *Rendell-Baker v. Kohn*,[26] a teacher sued a private school alleging denial of her constitutional rights as an employee. The Supreme Court held that just because the school received most of its funding from the state it was not thereby a "state actor." If that is true of the employees of a private school, it is true of the employees of an FBO. Similarly, in *Blum v.*

Yaretsky,[27] the Supreme Court held that the pervasive regulation of a private nursing home, along with the receipt of considerable government funding, did not render the home's conduct "state action."[28]

The opponents of the Faith-Based Initiative argue that 702(a) is different, for by the enactment of 702(a) Congress expressly authorized FBOs to "discriminate" on the basis of religion. So, they reason, the discrimination is fairly attributable to Congress. That is not the law. In *Flagg Brothers, Inc. v. Brooks,*[29] for example, the Supreme Court turned back a constitutional challenge to a provision in a state's commercial code where the legislature expressly allowed for self-help by a creditor in collecting a debt. The Court found no "state action," notwithstanding the legislature's enactment of the law whereby the self-help acts of creditors were explicitly authorized to the detriment of debtors. The law was merely permissive, reasoned the Court, thus the actions of creditors utilizing self-help was not attributable to the state. Section 702(a) is likewise permissive. It allows religious staffing, but it does not require it.[30]

The Supreme Court has examined 702(a) and the religious staffing question and observed that it was not "federal action" attributable to the federal government. Quoted above is the passage from *Corporation of the Presiding Bishop v. Amos*, wherein the Court held 702(a) simply "allows" religious groups to advance religion, and hence it is not "fair to say that the government itself" is responsible for the religious staffing.[31] Moreover, in *Amos* the employee that lost his job because he had fallen into disfavor with his church, argued that the failure of 702(a) to protect him from job discrimination denied him rights under the Free Exercise Clause. The Court said:

> Undoubtedly, [the employee]'s freedom of choice in religious matters was impinged upon, but it was the Church . . . and not the Government, who put him to the choice of changing his religious practices or losing his job.[32]

Thus, the Court thought it need not reach the merits of that free-exercise claim because, once again, the prior question of whether there was "federal action" must be answered in the negative. Only government can violate the Establishment Clause. An FBO is not the government, and the government is not involved in an FBO's staffing decisions.

B. The Establishment Clause is Not Violated

Opponents also argue that the Establishment Clause is violated when funded FBOs are permitted to staff on a religious basis. Although precedent for the Establishment Clause argument is thin to nonexistent, and the lack of "federal action" is an insurmountable hurdle, the opponent's enthusiasm for pressing forward is apparently undeterred. Opponents persist in characterizing 702(a) as a religious "preference," and they point out that while we insist on neutral treatment in grant criteria between secular and religious providers, we also insist on keeping 702(a) which is of use only to religious

providers. But this wrongly characterizes the principle of neutrality as a mere facial requirement. It is far more. For an FBO to have the right to staff on a religious basis is not a plea for preferential treatment, but an insistence on the same right that other ideological organizations have to ensure that their employees are committed to the organization's mission. The Sierra Club may hire only those who are committed to the environmental movement, the Libertarian Party may prefer those who are devoted to market solutions, and Planned Parenthood may screen for those who are pro-choice. It is a matter of simple justice that FBOs may employ those of like-minded faith. This is not a "preference" violative of the Establishment Clause. Rather, it is a principle of substantive equality. Equality in substance—not mere facial equality—reinforces the separation of church and state, as law professor Douglas Laycock has said in congressional testimony:

> To say that a religious provider must conceal or suppress its religious identity . . . or hire people who are not committed to its mission . . . uses the government's power of the purse to coerce people to abandon religious practices . . . . Charitable choice provisions that protect the religious liberty of religious providers are pro-separation; they separate the religious choices of commitments of the American people from government influence.[33]

A truly neutral social service program is one that does not skew the choices of beneficiaries toward or away from religious social service providers. If welfare beneficiaries are to have both secular and religious choices, then 702(a) is needed to attract the participation of FBOs and to safeguard their religious character from overly invasive regulation.

Opponents of the Faith-Based Initiative argue that their case is different. They insist that the situation is not simply that FBOs receive federal assistance unrelated to welfare delivery and that FBOs happen to discriminate in employment. Rather, say opponents, FBOs receive welfare program monies and then are discriminating in those very programs. But that is a distinction without a difference. The fact remains that the government makes its competitive grant awards on a basis that is wholly independent of an FBO's decision to staff on a religious basis. To again paraphrase the *Amos* decision, it is not unconstitutional for government to allow FBOs to pursue their own interests, which is their very purpose. For government to violate the Establishment Clause it must be the government itself that has advanced religion. All the government has set out to do here is to help the poor and needy by awarding its grant monies to the most effective and efficient applicants. If FBOs win some of these awards and deliver the secular services to the poor, while obeying first amendment restrictions on direct government funding, then that is the end of the government's oversight responsibilities.

A very similar Establishment Clause argument was made before a state court of appeals in *Saucier v. Employment Security Department.*[34] In *Saucier*, a state agency and a faith-based drug rehabilitation center were sued by a former counselor at the center seeking unemployment compensation. As a religious organization, the drug rehabilitation center was exempt under state law from paying unemployment compensation tax, hence benefits were unavailable. The rehabilitation

center was a recipient of federal and state welfare grants. When benefits were denied to the former employee, she argued that the welfare grants when juxtaposed with the tax exemption violated the Establishment Clause. The argument parallels the claim that a social service grant when juxtaposed with 702(a) violates the Establishment Clause. The court of appeals noted that the exemption for FBOs from unemployment taxes had been litigated elsewhere and found not to violate the Establishment Clause. The court in *Saucier* did not find any connection between the tax exemption and the center's receipt of welfare grant monies.[35] Hence, the former employee's claim was dismissed.

The constitutionality of 702(a) when an FBO is a recipient of a government grant parallels a dispute that arose over whether Congress could, without running afoul of the Establishment Clause, provide religious hospitals with funding under the Hill-Burton Act.[36] The Hill-Burton Act provides federal funding for capital improvements to hospitals. Hospitals are eligible, whether public or private, without regard to religion. Some of the funded hospitals refused to provide abortions and sterilizations because the performance of such procedures was contrary to the religious alignment of the hospital. Patients seeking these reproductive services argued that for government to fund these hospitals, under these circumstances, was promoting religious belief contrary to the Establishment Clause. Congress disagreed and modified the Hill-Burton Act by adopting an amendment offered by Senator Frank Church, a Democrat from Idaho. What came to be known as the "Church Amendment" provided that the receipt of any grant under the act by a hospital did "not authorize any court or public official to require . . . [s]uch entity to . . . make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions."[37] The Church Amendment was challenged as a violation of the Establishment Clause, with the claimants juxtaposing the government aid with the free exercise exemption. However, the federal courts found that Congress had only sought to preserve neutrality in the face of religious and moral differences, and thus they had little trouble upholding the amendment.[38] A religious hospital's refusal to provide certain reproductive services was a wholly private act, not "federal action." The Church Amendment simply permitted religious hospitals to be true to their beliefs. A legislature does not establish religion by leaving it alone.

Section 702(a) likewise places the government in a position of religious neutrality. With both discretionary and block grants, the objective of the federal government is to provide grant monies to the most effective and efficient social service providers. Whether or not a nongovernmental grantee staffs on a religious basis is a matter on which the government takes no position, hence the Establishment Clause is not implicated.

Opponents of the Faith-Based Initiative point to only one case, *Dodge v. Salvation Army*,[39] an unpublished opinion by a federal trial court in Mississippi. *Dodge* is truly an outlier. In *Dodge*, the Salvation Army had received federal and state grants to operate a domestic

violence shelter. A new federal grant enabled the change in employment status of Ms. Jamie Dodge, from part-time to a full-time basis, as a Victims' Assistance Coordinator. When first hired Ms. Dodge said she was a Catholic. One day she was discovered using the office photocopy machine for unauthorized personal use. Moreover, the materials Ms. Dodge was copying were "manuals and information on Santanic/Wiccan rituals." The Salvation Army dismissed Ms. Dodge citing her unauthorized use of office materials and her "occult practices that are inconsistent with the religious purposes of the Salvation Army."

Neither the federal nor state agency that awarded the domestic violence grants were ever joined as party defendants. Hence, the government was not a party to be heard by the court and to defend the law. Moreover, because only government can violate the Establishment Clause and neither government agency was sued, the court never should have entertained an alleged violation of the clause. After that inauspicious beginning things only got worse. The *Dodge* court proceeded to hold 702(a) **unconstitutional as applied to the government-funded employment position of victims' coordinator. This holding in *Dodge* was of doubtful rationale when decided, and given later developments the opinion is clearly not the law today.[40] The court refused to follow the Supreme Court decision most directly in point, *Corporation of the Presiding Bishop v. Amos*, which just two years before had unanimously upheld the application of 702(a) as applied to a janitor with essentially secular duties at a church-related facility. Instead, *Dodge* reasoned from a fifteen-year-old case that was essentially irrelevant, *Lemon v. Kurtzman*.[41] *Lemon* held that the job of a teacher at a parochial school so integrates religious and secular functions that the government cannot fund even part of a teacher's salary. *Dodge*, however, involved a job that entailed secular functions that government could fund, so *Lemon* was not in point. The *Dodge* court went on to infer that if government could not fund a pervasively religious job like parochial school teachers, then any government-funded job must be secular. But the victims' coordinator job in *Dodge*, like the janitor in *Amos,* was secular. So 702(a) could have applied to Ms. Dodge's job of victim's coordinator without implicating *Lemon* and the Establishment Clause. Hence, *Dodge* should have been following *Amos*—not the factually irrelevant decision in *Lemon*.**

More import for our purpose, since *Dodge* was decided in 1989 the trend in the law has been strongly against *Lemon* and its rule of no-aid to pervasively religious organizations. Since the 1989 opinion in *Dodge*, five important cases upholding the distribution of government benefits on a neutral basis to nongovernmental organizations, including the pervasively religious, have come down.[42] Four other important cases restricting the distribution of government aid to religious organizations, good law at the time of *Dodge*, have since been overruled in whole or substantial part.[43] None of these post-*Dodge* developments squarely address the constitutionality of applying 702(a) to an private employer providing government-funded services. However, this broad trend in the Supreme Court in favor of the rule of neutrality fatally undermines the *Dodge* court's suspicious reaction to government-funded welfare services administered by pervasively religious providers.

III. THE RELIGIOUS FREEDOM RESTORATION ACT RELIEVES FAITH-BASED SERVICE PROVIDERS FROM FEDERAL PROGRAM-SPECIFIC EMPLOYMENT NONDISCRIMINATION PROVISIONS SUCH AS SECTION 175(C).

Where program specific employment nondiscrimination clauses, such as sec. 175(c), apply to federally assisted social service providers, FBOs that employ staff on a religious basis are to that extent protected by the Religious Freedom Restoration Act of 1993 [RFRA].[44] RFRA excuses federally funded[45] FBOs[46]—those that have a sincerely held religious practice of employing those of like-minded faith—from having to incur a substantial religious burden when the burden is impose by a generally applicable federal law.[47] Being prohibited from staffing on a religious basis is most assuredly a burden on the free-exercise of religion. It is no answer to argue, as some opponents of the Faith-Based Initiative do, that an FBO can just avoid the burden by foregoing its ability to compete for grants under the welfare program in question. Just as the government cannot justify restricting a particular form of speech merely by pointing to other opportunities that a person has to express herself, so government cannot restrict a particular exercise of religion by pointing to another course of action whereby the organization's religious practices are not penalized. Indeed, RFRA explicitly contemplates that a "denial of government funding" because of a service provider's religion or religious practice can trigger RFRA.[48] That only makes sense. The congressional passage of RFRA was about "restoring" a standard of protection for religious free-exercise as reflected in *Sherbert v. Verner*,[49] a case about a denial of government funding.[50] Just as the Supreme Court held in *Sherbert* that an individual refusing to take a job entailing work on her Sabbath could not be put to the "cruel choice" of forfeiting her claim for unemployment compensation or violating her religious day-of-rest, an FBO cannot be put to the "cruel choice" of forfeiting its ability to compete for valuable program grant monies or violating its religious practice of employing only those of like-minded faith.

In RFRA itself the term "religious exercise" is broadly defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[51] Nonetheless, opponents further argue that for government to decline to facilitate the free-exercise of religion is not a "religious" burden. The Free Exercise Clause is written in terms of what the government cannot do to an FBO, observe these opponents, not in terms of what an FBO can exact from the government. This is true, but that line of argumentation does not describe what is occurring here. The government may choose to itself deliver all social services to the poor and the needy. If that occurs, then the denial of funding to an FBO is indeed not a free-exercise burden.[52] The government, however, has not chosen that path. Rather, the government has chosen to award grants to nongovernmental providers who in turn deliver the social services. Having chosen to deliver services via providers in the private sector, government cannot now pick and choose among those providers using eligibility criteria that has a discriminatory impact adverse to FBOs. A discriminatory impact from an otherwise neutral law is the very type of occurrence that Congress sought to stop by enacting RFRA. *See* 42 U.S.C. § 2000bb-1(a) ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability").

Conceding, as they must, that by its terms a denial of grant funding can trigger RFRA, opponents of the Faith-Based Initiative argue that RFRA cannot be invoked by FBOs because

the loss of grant monies is not a "substantial" religious burden. This makes no sense. It is true that religious organizations making claims of increased financial burden, without more, have not been excused from compliance with general regulatory and tax legislation. That is, it is not always enough to simply show that a neutral law increases an FBO's cost of operating. But those cases have no resemblance to the claim of burden here. Rather, these program-embedded nondiscrimination provisions uniquely harm FBOs by preventing them from maintaining their religious character by hiring co-religionists to perform the ministry. The harm is not financial or economic, the harm is religious. As with the abridgment of free-speech rights, the impairment of the free-exercise of religion is a cognizable harm *per se* and thus "substantial." A bar on religious staffing cuts the very soul out of an FBO's ability to define and pursue its spiritual calling, as well as sustain itself over generations.[53]

RFRA can be overridden, of course, upon a showing of a "compelling governmental interest." But it is absurd to claim, as some opponents do, that the eradication of religious staffing by FBOs is a compelling interest. Congress sought to achieve just the opposite when it provided in 702(a) that Title VII's ban on religious discrimination should not apply to FBOs. Permitting FBOs to staff on a religious basis does not undermine social norms or constitutional values. Just the opposite is true. This freedom minimizes the influence of governmental actions on the religious choices of both welfare beneficiaries and religious organizations. Safeguarding an FBO's freedom of religious staffing advances the Establishment Clause value of noninterference by government in religious affairs. Senator Sam Ervin said it more colorfully in stating that the aim is to "take the political hands of Caesar off of the institutions of God, where they have no place to be." In *Corporation of the Presiding Bishop v. Amos*, the Supreme Court put its seal of approval on that congressional judgment. And this is the judgment not just of Congress in 702(a) and a unanimous Court in *Amos*, but also of President Bush as he spoke while instituting his Administration's Faith-Based Initiative:

> We will encourage faith-based and community programs without changing their mission. We will help all in their work to change hearts while keeping a commitment to pluralism.
> . . . Government has important responsibilities for public health or public order and civil rights. . . . Yet when we see social needs in America, my administration will look first to faith-based programs and community groups, which have proven their power to save and change lives. We will not fund the religious activities of any group. But when people of faith provide social services, we will not discriminate against them.
> As long as there are secular alternatives, faith-based charities should be able to compete for funding on an equal basis, and in a manner that does not cause them to sacrifice their mission.[54]

The President's speech has all the right elements: effective help for the poor as the paramount concern and objective, equality between secular and religious providers, and respect for civil rights within a framework of respecting everyone and thus not forcing a change in the religious mission of charities who serve out of faith. Additionally, Senator John Ashcroft, now U.S. Attorney General, has observed that the Faith-Based Initiative results in the poor and needy

having more choices when it comes to welfare providers to serve them, some of whom want to seek out assistance at robustly faith-centered providers.[55] These are the social norms to be upheld and the constitutional values to be reinforced. In the face of these affirmations from all three branches of the government, the opponent's audacious assertion that resistance to religious staffing rights holds the high ground of "social norm" is little more than personal opinion.

We hasten to add that reliance on RFRA in no way excuses compliance with federal civil rights laws when it comes to employment discrimination on the bases of race, national origin, sex, age, disability, and the like.[56] RFRA guards only against burdens on religion.

IV. POLICY CONSIDERATIONS

Safeguarding the right to religious staffing is at the heart of any attempt to protect the religious character of charitable and social service providers. The following public policy considerations support religious staffing rights for FBOs.[57]

1. A religious organization's decision to employ staff who share its religious beliefs is not an act of shameful intolerance but a laudable and positive act of freedom.

In a pluralistic society that enjoys full freedom of association, a wide variety of ideology-based organizations rightly are at liberty to select employees who share their core commitments. Environmental organizations, feminist groups, unions, and political parties, all are free to choose staff who subscribe to their central ideology. This freedom should not disappear if governments invite these private sector organizations to perform some public task. Planned Parenthood, for example, does not lose its freedom to hire pro-choice staff simply because it has a government contract. To deny this same freedom to religious organizations would itself be discriminatory, not the promotion of a society where all are equal before the law.[58]

It is confusion to equate this positive good with the evil of discrimination on the basis of race or gender. Whether one thinks that religion is a backward superstition that modern folk ought to abandon or an inherent trait of humanity and generally positive contributor to societal well-being, all who believe in freedom of expressive association for cause-oriented groups should insist that religious hiring rights by FBOs is a good thing to be protected by law rather than an evil to be restricted and suppressed.

2. The ability to choose staff who share a religious organization's beliefs is essential to that organization retaining its core identity.

As noted earlier, Justice William Brennan in *Corporation of the Presiding Bishop v. Amos* observed that determining whether "certain activities are in furtherance of an organization's religious mission and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself."[59] Having staff that share a religious organization's religious beliefs profoundly shapes the character of an organization in a variety of ways. Similar values, a sense of community, unity of purpose, and shared experiences

of prayer and worship (outside program time) all contribute to an *esprit de corps* and common vision. A Jewish organization forced to hire Baptist staffers will not long remain a significantly Jewish organization. The sense of religious community and spirit on which success of the organization's efforts depend will be crippled is a faith-based charity is forced to hire those who do not share then organization's vision and mission.

Hiring rights are essential even when a faith-centered organization separates by location or time (and pays for with private money) worship, religious instruction, and proselytization from its government-funded program. This is so for multiple reasons. First, by experience these organizations have learned that religious activities are important to the success of a social service program even when voluntary, privately funded, and segregated from "secular" government-funded activities. In such programs, certain religious beliefs and practices are legitimate qualifications for a staff position, equally as valid as having the right technical skills or educational credentials.

Second, forced religious diversity has the effect of stifling religious expression within the agency, creating a climate where employees fear offending other staff with their religious speech or practices. Since personal faith is often important to those who choose to work in a religious organization, such a climate will diminish staff motivation and effectiveness. A forced diversity will sap a program's spiritual vitality and lead to its secularization.

Third, staff often hold multiple roles, especially in small organizations or those with tight budgets. For example, an agency might seek someone as half-time youth minister and half-time social worker for their youth mentoring program. A law in which religion can be a factor in hiring for some jobs but not others within the same agency will lead to complicated and impermissibly entangling regulation.

3. Religious charities that wish to retain staffing rights are not trying to foist their religion on others, but ask only that others not impose alien values on their internal operations.

Religious charities who choose to select staff that share their religious beliefs want other cause-oriented organizations to have the same freedom to staff based on the group's ideology. FBOs are not foisting their religious beliefs or morality on others. Rather than imposing their own worldview on unwilling others, they simply want each cause-based organization to be free to make employment choices based on its deepest commitments. It is those seeking to deny the staffing safeguard to religious groups who are trying to use the coercive power of the state to foist their ideological beliefs on FBOs.

4. Removing the right of religious organizations to staff on the basis of religion would require drastic, widespread change in current practice.

Religious colleges and universities, religious hospitals, religious retirement and nursing homes, religious foster care homes, and many other religious organizations receive government funding to assist in their educational, health care, and social service activities.[60] Many of these

organizations consider the existing, long-recognized staffing safeguard to be essential to any continuing provision of services. Those who oppose religious staffing protection as part of the Faith-Based Initiative, if they are consistent, will seek to overturn and outlaw a vast range of situations where government currently cooperates with faith-based organizations. Such a radical disruption of existing education, health care, elder care, and foster care would be tragic.

5. Prohibiting government assistance for religious social service providers that staff on a religious basis will hurt the poor and needy.

In an op-ed in *The Wall Street Journal*, Andrew Young asked: "Why should the [religious] organizations that are best at serving the needy be excluded from even applying for government funding?"[61] Urging Senate passage of legislation that would expand charitable choice to additional federal welfare programs, Young warned opponents not to play politics with the poor and needy.

Young's premises of course may be wrong. His argument assumes that the poor need both moral/spiritual as well as material transformation, and that FBOs often are more effective. We do not yet have extensive, comparative quantitative studies demonstrating that (other things being equal) intensely faith-centered welfare providers produce better results. A lot of anecdotal data, however, clearly suggest that thoroughly faith-centered programs are producing remarkable outcomes in contexts where almost nothing else seems to work—a finding that fits with the vast number of quantitative studies demonstrating that for many people religion contributes positively to emotional and physical well-being.[62] These success stories often come from religious organizations which are very certain that the faith-factors in their programs are a crucial cause of their success. If they are right, then refusing to fund such agencies means denying many of our most needy citizens the best available help.

6. Because government is now asking religious groups to provide more social services, the government should reciprocate by respecting the integrity of these organizations.

Religious organizations have been caring for the poor and needy for millennia. They will continue to do so regardless of what government says, or funds. Today, however, federal, state, and local governments are asking faith-based groups to provide more social services and offering public support to expand their capacity. Partly this is because the available data suggest that FBOs produce better results and partly because religious organizations are frequently the only institutions still functioning in depressed neighborhoods. If government wants additional help, then it should respect and preserve the integrity of FBOs rather than destroying the very features that makes them uniquely effective. The right to staff with individuals that share the religious group's beliefs is the single most important way to ensure that FBOs can deliver on the government's call for expanded assistance to the needy.

1. Also implicated is Section 417(c) of the Domestic Volunteer Service Act (42 U.S.C. § 5057(c)).

2. *President Promotes Faith-Based Initiative*, White House Press Release, (Apr. 4, 2002), at http://www.whitehouse.gov/news/releases/2002/04/20020411-5.html.

3. *President Bush Implements Key Elements of his Faith-Based Initiative*, White House Press Release (Dec.12, 2002), at http://www.whitehouse.gov/news/releases/2002/12/20021212-3.html.

4. 42 U.S.C. § 2000e *et seq*. *See* Pub. L. No. 88-352, 78 Stat. 253 (1964).

5. Section 702(a) originally read, in relevant part, as follows:

> This title shall not apply to . . . a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities . . . .

Pub. L. No. 88-352, 78 Stat. 255 (1964).

6. Pub. L. No. 92-261, 86 Stat. 103 (1972).

7. Section 702(a) presently provides, in relevant part, as follows:

> This title shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 U.S.C. § 2000e-1(a).

Federal law prohibits employment discrimination on additional protected bases. The Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34, prohibits employment discrimination on the basis of age. It applies to employers of 20 or more employees. There is no exemption set forth in the act for religious organizations. The Americans with Disabilities Act, 42 U.S.C. §§ 12101- 12213, prohibits discrimination against otherwise qualified individuals with disabilities. The employment protections are found at §§ 12111 - 12117. The ADA applies to employers of 15 or more employees. Nothing in the ADA prohibits religious organizations from staffing on a religious basis. *Id*. at § 12113(c). Finally, the Equal Pay Act of 1963, 29 U.S.C. 206(d), requires equal pay for equal work without regard to sex. It applies to employers who are also subject to the federal minimum wage. There is no statutory exemption for religious organizations.

8. *See* Little v. Wuerl, 929 F.2d 944, 949-51 (3d Cir. 1991) (giving a brief account of the congressional purpose behind broadening 702(a)).

9. 118 Cong. Rec. 4503 (Feb. 17, 1972) (Senator Sam Ervin).

10. A long line of Supreme Court cases admonish government, including the courts, to avoid probing into the religious meaning of words, practices, and events by religious organizations. *See* **Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 843-44 (1995) (university should avoid distinguishing between evangelism, on the one hand, and the expression of ideas merely approved by a given religion); Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 336 (1987), and *id.* at 344-45 (Brennan, J., concurring) (recognizing a problem when government attempts to divine which jobs are sufficiently related to the core of a religious organization so as to merit exemption from statutory duties is desirable); Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.30 (1983) (avoiding potentially entangling inquiry into religious practice); Widmar v. Vincent, 454 U.S. 263, 269-70 n.6, 272**

n.11 (1981) (holding that inquires into the religious significance of words or events are to be avoided); Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981) (not within judicial function or competence to resolve religious differences); Gillette v. United States, 401 U.S. 437, 450 (1971) (Congress permitted to accommodate "all war" pacifists but not "just war" inductees because to broaden the exemption invites increased church-state entanglements and would render almost impossible the fair and uniform administration of selective service system); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (avoiding entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs is desirable); Cantwell v. Connecticut, 310 U.S. 296, 305-07 (1940) (petty officials not to be given discretion to determine what is a legitimate "religion" for purposes of issuing permit); *see also* Rusk v. Espinosa, 456 U.S. 951 (1982) (aff'd mem.) (striking down charitable solicitation ordinance that required officials to distinguish between "spiritual" and secular purposes underlying solicitation by religious organizations). The concern is threefold: the lack of judicial competence to resolve doctrinal questions, the potential for interference by the state in religious affairs, and the potential for "establishment" when a court favors one religious interpretation of words or events over others. For similar reasons, courts are to avoid making a determination concerning the centrality of the religious belief or practice in question to an overall religious system. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) (rejecting free-exercise test that "depend[s] on measuring the effects of a governmental action on a religious objector's spiritual development"); United States v. Lee, 455 U.S. 252, 257 (1982) (rejecting government's argument that free-exercise claim does not lie unless "payment of social security taxes will . . . threaten the integrity of the Amish religious belief or observance"); Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981); *cf.* City of Boerne v. Flores, 521 U.S. 507, 513 (1997); Employment Div. v. Smith, 494 U.S. 872, 886-87 (1990).

11. The plurality in Mitchell v. Helms, 530 U.S. 793 (2000), referred with approval to this line of precedent as reason for abandoning the "pervasively sectarian" test.

> [T]he inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs. See *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 887 (1990) (collecting cases). Yet that is just what this factor requires, as was evident before the District Court. Although the dissent welcomes such probing . . . , we find it profoundly troubling.

Id. at 828. In reliance on this passage in *Mitchell*, the D.C. Circuit overturned an NLRB policy. *See* Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1341 (D.C. Cir. 2002) (refusing to issue collective bargaining order against Catholic college because NLRB's "primarily religious" versus "not primarily religious" test was violative of religious autonomy doctrine of first amendment). *See also* Columbia Union College v. Oliver, 254 F.3d 496, 504 (4th Cir. 2001) (finding that *Mitchell* abandon the "pervasively sectarian" test); John D. Ashcroft, *Statement on Charitable Choice*, Proceedings and Debates of the 105th Cong., 2d Sess., 144 Cong. Rec. S12686 (Oct. 20, 1998) (disapproving, for constitutional reasons, of the "pervasively sectarian" test).

12. 483 U.S. 338 (1987).

13. *Id.* Justice White wrote the majority opinion. Justice Brennan wrote an opinion concurring in the judgment, joined by Justice Marshall. *Id.* at 340. Justice Blackmun wrote an opinion concurring in the judgment, joined by Justice O'Connor. *Id.* at 346.

14. The first amendment provides, in relevant part, as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. AMEND. I.

15. 483 U.S. at 337. This was not a new development. The Supreme Court had previously sustained religion-specific exemptions from regulatory burdens in the face of challenges under the Establishment Clause. *See* **Gillette v. United States, 401 U.S. 437 (1971) (religious exemption from military draft for those who oppose all war does not violate Establishment Clause); Zorach v. Clauson, 343 U.S. 306 (1952) (upholding release-time program for**

students to attend religious exercises off public school grounds); Arver v. United States, 245 U.S. 366 (1918) (upholding, *inter alia*, military service exemptions for clergy and theology students).

16. Montrose Christian School Corp. v. Walsh, 770 A.2d 111 (Md. App. 2001). The court held that governmental interference with the internal management of religious organizations would result from an ordinance prohibiting employment discrimination on the basis of religion where religious organizations were exempt but only as to employees with "purely religious functions." *Id*. at 124. The Supreme Court's church autonomy doctrine was relied upon, a line of cases that has its origin in the separation of church and state. *Id*. at 123-24.

17. The FCC's proposed rules revising the equal employment regulations for religious broadcasters appears at 63 Fed. Reg. 66104 (Dec. 1, 1998). The final regulation is codified at 47 C.F.R § 73.2080(a), and provides: "Religious radio broadcasters may establish religious belief or affiliation as a job qualification for all station employees."

18. *Amos*, 483 U.S. at 342-43.

19. Section 702(a) should not be confused with the first amendment's "ministerial exemption" to Title VII and similar civil rights laws. The "ministerial exemption" is in one respect more narrow and in one respect more broad than 702(a). It is more narrow in that it only applies to staff that are clergy or otherwise religious ministers. It is more broad in that it permits discrimination not just on the basis of religion, but on any basis such as sex or national origin. *See, e.g*., Rayburn v. General Conf. of Seventh-day Adventists, 772 F.2d 1165 (4th Cir. 1985) (holding that for first amendment reasons court could not consider sex discrimination claim by assistant minister against her church); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981) (holding that seminary need not submit employment reports on its faculty to the EEOC because they are "ministers"); McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972) (holding that for first amendment reasons Title VII does not regulate the employment relationship between church and its minister). For more recent cases, see EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 124 (4th Cir. 2000); Gellington v. Christian Methodist Episcopal Church, Inc. 203 F.3d 1299 (11th Cir. 2000); EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); Young v. N. Ill. Conf. of United Methodist Church, 21 F.3d 184 (7th Cir. 1994); Natal v. Christian & Missionary Alliance, 878 F.2d 575 (1st Cir. 1989); Hutchison v. Thomas, 789 F.2d 392 (6th Cir. 1986).

An FBO's employees working in a government-funded social service program would not be subject to the "ministerial exemption." This is because their job tasks would not fit the description of clergy or other "minister." From the viewpoint of the government, an FBO's staff is performing secular work, i.e., the delivery of social services. This is so, albeit from the viewpoint of the FBO and its staff they are religiously motivated in their vocation of helps to the poor.

20. The Bush Administration has recognized that current first amendment law on direct funding requires financial separation of government funded activities by FBOs and any inherently religious activities. For example, H.R. 7, as passed by the House and backed by the Administration, provides for this separation. *See* Community Solutions Act of 2001, H.R. 7, Title II, § 201(Sec. 1991(j)), 107th Cong., 147 Cong. Rec. H4242 (July 19, 2001). The restriction does not, however, apply to indirect funding. The former head of the White House Faith-Based Office, John DiIulio, has said that if the provider is an "indivisibly conversion-centered program that cannot separate out and privately fund its inherently religious activities, [it] can still receive government support, but only via individual vouchers." John J. DiIulio, Jr., Speech Before the National Association of Evangelicals, *Compassion "In Truth and Action": How Sacred and Secular Places Serve Civic Purposes, and What Washington Should and Should Not Do to Help*, available at http://www.whitehouse,gov/news/releases/2001/03/20010307-11.html.

21. Silo v. CHW Medical Foundation, 45 P.3d 1162, 1170 (Cal. 2002) (dismissing employee's claim of religious discrimination as a matter of Catholic hospital's first amendment autonomy to control the religious speech of its employees).

22. *See* John C. Green and Amy L. Sherman, *Fruitful Collaborations: A Survey of Government-Funded Faith-Based Programs in 15 States* (Hudson Institute, September 2002), available at www.hudsonfaithincommunities.org.

23. *See* Hall v. Baptist Memorial Health Care Corp., 215 F.3d 618, 625 (6th Cir. 2000) (dismissing religious discrimination claim filed by employee against religious organization because organization was exempt from Title VII and the receipt of substantial government funding did not bring about a waiver of the exemption); Siegel v. Truett-McConnell College, 13 F. Supp.2d 1335, 1343-45 (N.D. Ga. 1994), *aff'd*, 73 F.3d 1108 (11th Cir. 1995) (table) (dismissing religious discrimination claim filed by faculty member against religious college because college was exempt from Title VII and the receipt of substantial government funding did not bring about a waiver of the exemption); Young v. Shawnee Mission Medical Center, 1988 U.S. Dist. LEXIS 12248 (D. Kan. Oct. 21, 1988) (holding that religious hospital did not lose Title VII exemption merely because it received federal Medicare payments); *see also* Arriaga v. Loma Linda University, 13 Cal. Rptr.2d 619 (Cal. App. 1992) (holding that religious exemption in state employment nondiscrimination law was not lost merely because religious college received state funding). In addition, a legal opinion by the Office of Legal Counsel at the U.S. Department of Justice also concluded that 702(a) is not forfeited when an FBO receives federal funding. Memorandum for Brett Kavanaugh, Associate White House Counsel, from Sheldon Bradshaw, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice (June 25, 2001).

24. Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991), was the first reported case to observe **categorically that 702(a) cannot be waived.**

25. The lack of "federal or state action" here is analogous to the Supreme Court's rationale for sustaining the constitutionality of "indirect" funding cases such as those involving public school vouchers. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding state public school voucher program open to a broad class of schools, including religious schools). When the parents of a school-age child, empowered with an educational voucher, make an independent choice of where to enroll their child, the Establishment Clause is not implicated when the aid goes to a religious school as a result of the private choice. Like the choice of these parents, the private choice by an FBO concerning religious staffing does not implicate the government/grantor as the "causal actor." Hence the staffing decision does not incur Establishment Clause scrutiny. This is just another way of demonstrating that the opposition's argument here proves too much, for if FBOs are "federal actors" for purposes of their employment practices then they are "federal actors" for all other things that they do. Yet there is wide agreement that such a result is absurd. The mere receipt of a government grant cannot be the legal equivalent of "nationalizing" a private sector charity.

26. 457 U.S. 830 (1982).

27. 457 U.S. 991 (1982).

28. The Supreme Court's holdings in *Rendell-Baker* and *Blum* clearly overturned the result in an earlier, lower court decision involving a private, secular social service provider. *See* Robinson v. Price, 553 F.2d 918 (5th Cir. 1977) (reversing dismissal on the pleadings and remanding for factual inquiry into whether a private, secular social service provider was a "state actor" because, *inter alia*, it received government grant monies). *Robinson* is also distinguishable because eight members of the provider's board of directors were appointed by local government and all funding requests had to first be approved by local officials. Those facts, alleged the plaintiff, arguably made the provider a joint public/private program. Such heightened government involvement does not occur with the Faith-Based Initiative.

29. 436 U.S. 149, 164 (1978). *Accord* American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 54 (1999).

30. Opponents of the Faith-Based Initiative cite to Norwood v. Harrison, 413 U.S. 455 (1973). *Norwood* is not applicable. The case came at a time when Southerners were opening private, segregated academies to avoid public school desegregation. Eradication of racially segregated public schools is a constitutional duty of the state. In response, the Court was aggressive in piercing through paper veils that purported to erect public/private distinctions. The Court's aim was, of course, to reverse the larger pattern of racially segregated schools. In that vein, *Norwood* held unconstitutional a program for loaning textbooks to private k-12 schools, including religious schools, because the program undermined the duty to desegregate public schools. The circumstances before us concerning the Faith-Based Initiative are different. To permit FBOs to staff on a religious basis undercuts no duty of the state to ensure that it refrain from religious discrimination. Indeed, the aim is to stop past religious discrimination against the funding of FBOs. Additionally, to read *Norwood* as applicable here puts it at odds with *Amos, Rendell-Baker, Blum*, and *Flagg Brothers*, all more recent decisions. That would call into question whether *Norwood* even survives. *Norwood* remains good law, but it is confined to its facts and its times.

31. 483 U.S. 327, 337 (1987).

32. *Id.* at 337 n.15.

33. *The Constitutional Role of Faith-Based Organizations in Competitions for Federal Social Service Funds*, Hearing Before the House Subcomm. on the Constitution, House Judiciary Comm., 107th Cong., 23 (June 7, 2001) (testimony of Douglas Laycock).

34. 954 P.2d 285 (Wash. App. 1998).

35. *Id*. at 288-89. The court relied on Rojas v. Fitch, 127 F.3d 184 (1st Cir. 1997), holding that an exemption for religious organizations from unemployment tax did not violate the Establishment Clause.

36. The full title of the Hill-Burton Act is the Hospital Survey and Construction Act of 1946, 42 U.S.C. §§ 291 - 291o-1.

37. Section 401(b) of the Health Programs Extension Act of 1973, Pub. L. No. 93-45, 87 Stat. 95 (codified at 42 U.S.C. § 300a-7).

38. *See* Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308, 311-12 (9th Cir. 1974) (holding that Church Amendment reflects the congressional view that Hill-Burton grantees are not acting under color of law). *See also* Taylor v. St. Vincent's Hospital, 523 F.2d 75, 77 (9th Cir. 1975) (same); Seale v. Jasper Hospital Dist. and Jasper Memorial Hospital Foundation, Inc., 1997 WL 606857 * 4 - *5 (Tex. App. Oct. 2, 1997) (finding religious hospital does not waive its right to refuse to perform sterilizations and abortions merely because it had a lease with the government on its building). The cases further observe that religious hospitals have free-exercise rights, and those rights cannot be forfeited as a condition for qualifying for federal funding. *See* Doe v. Bellin Memorial Hospital, 479 F.2d 756, 761 (7th Cir. 1973).

39. 1989 WL 53857 (S.D. Miss. 1989).

40. The criticism of the *Dodge* case that appears in the text was taken in substantial part from a July 2001 letter from Douglas Laycock, Professor of Law at the University of Texas - Austin, to Senator Patrick Leahy, Chair of the Senate Judiciary Committee.

41. **403 U.S. 602 (1971)**.

42. ***See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Mitchell v. Helms, 530 U.S. 793 (2000); Agostini v. Felton, 521 U.S. 203 (1997); Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995); Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993).**

43. ***See* Wolman v. Walter, 433 U.S. 229 (1977), *overruled in* Mitchell v. Helms, 530 U.S. 793, 835, 837 (2000); Meek v. Pittenger, 421 U.S. 349 (1975), *overruled in* Mitchell v. Helms, 530 U.S. 793, 835, 837 (2000); Aguilar v. Felton, 473 U.S. 402 (1985), *overruled in* Agostini v. Felton, 521 U.S. 203, 235 (1997); School District of Grand Rapids v. Ball, 473 U.S. 373 (1985), *overruled in part in* Agostini v. Felton, 521 U.S. 203, 235 (1997).**

44. 42 U.S.C. §§ 2000bb to 2000bb-4.

45. RFRA does not excuse compliance with the normative operation of state and local laws, only compliance with federal laws, as well as the actions of federal agencies and officials. City of Boerne v. Flores, 521 U.S. 507 (1997).

46. RFRA reads in terms of protecting the rights of "persons," but under the U.S. Code the term "persons" includes organizations, thereby including protection for FBOs. *See* 1 U.S.C. § 1(b).

47. In one sense RFRA is case specific, responding to each individual's or organization's sincerely held claim of religious burden. But for FBOs that staff on a religious basis RFRA will always grant relief from generally applicable employment laws prohibiting discrimination on the basis of religion. Because RFRA will grant relief without fail to FBOs with sincerely held religious staffing practices, it is proper to presume, as we have in the text, that there is a presumption that RFRA excuses FBOs from the religious burden imposed by these program-embedded nondiscrimination provisions. As with any presumption, the government, of course, can inquire into the bona fides of the FBO's claim and rebut the operation of RFRA by evidence of insincerity.

48. *See* 42 U.S.C. § 2000bb-4 ("Granting government funding . . . shall not constitute a violation of this chapter. As used in this section, the term 'granting,' used with respect to government funding, . . . does not include the denial of government funding . . . ."). *See also* Senate Report No. 103-111, at 13 ("parties may challenge, under the Religious Freedom Restoration Act, the denial of benefits to themselves as in *Sherber[t]*"); *id*. at 15 ("the denial of [government] funding . . . may constitute a violation of the act, as was the case under the free exercise clause in *Sherbert v. Verner*"). Senate Report No. 103-111, is reprinted at 1993 U.S.C.C.A.N. 1892.

49. 374 U.S. 398 (1963) (claimant cannot be disqualified from unemployment compensation because she refused to take job entailing Saturday work because it was her religious Sabbath).

50. RFRA states, as one of its purposes, "to restore the compelling interest test" of *Sherbert v. Verner*. *See* 42 U.S.C. § 2000bb(b)(1). The denial of funding in *Sherbert* was slightly different from the denial of a social service grant to an FBO. But RFRA was not drafted to restore the holding of a single case. *Sherbert* was illustrative of the problem, not the whole problem. The terms of the RFRA legislation read in general principles, with the object being the provision of a remedy for a variety of religious burdens—no matter how or where the burdens occur.

51. 42 U.S.C. § 2000bb-2(4) (incorporating by reference the definition of "religious exercise" in 42 U.S.C. § 2000cc-5(7)).

52. In Brusea v. Board of Education, 405 U.S. 1050 (1972) (decision below summarily aff'd), the Supreme Court affirmed that a state's provision of free public school education only does not compel the state to have to provide an equal benefit to religious school parents. Similarly, Luetkemeyer v. Kaufmann, 419 U.S. 888 (1974) (decision below summarily aff'd), affirmed that a state may choose to provide free bussing to government schools alone

without providing an equal benefit to religious schools. But *Brusea* and *Luetkemeyer* are inapposite to the situation here where the government has elected to involve private charities in welfare delivery.

53. The dollar amount, large or small, of any particular available grant is not relevant to RFRA's "substantial burden" requirement. A promise to comply with these program-embedded nondiscrimination provisions is an essential criteria of grant eligibility. To not accommodate sincerely held religious employment practices is thus a categorical bar, from here to eternity, to an FBO's eligibility for any such federal grant program. That unquestionably is a substantial burden or "cruel choice," and the burden is uniquely religious rather than monetary.

54. *Remarks by the President in Announcement of the Faith-Based Initiative* (Jan. 29, 2001), available at http://www.whitehouse.gov/news/releases/print/200110229-5.html.

55. *See* John D. Ashcroft, *Statement on Charitable Choice*, Proceedings and Debates of the 105th Cong., 2d Sess., 144 Cong. Rec. S12686, S12687 (Oct. 20, 1998) ("Demanding that religious ministries 'secularize' in order to qualify to be a government-funded provider of services hurts intended beneficiaries of social services, as it eliminates a fuller range of provider choices for the poor and needy, frustrating those beneficiaries with spiritual interests.").

56. Opponents argue that our use of RFRA would excuse racial discrimination rooted in religious belief. Not true. We have seen no RFRA case where racial discrimination was excused under the guise of religion. Moreover, the Supreme Court has already held that the denial of benefits to a religious organization in the interest of eradicating racial discrimination is a compelling governmental interest. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 602-04, 604 n.29 (1983). RFRA claims are overridden, of course, by compelling state interests. 42 U.S.C. § 2000bb-1(b).

57. The points that follow are drawn in many respects from Ronald J. Sider, *The Case for "Discrimination,"* FIRST THINGS 19 (June/July 2002).

58. ***See* Nathan J. Diament, *A Slander Against our Sacred Institution*, THE WASHINGTON POST A23, May 28, 2001.**

59. 483 U.S. 327, 342 (1987).

60. **Stephen V. Monsma, WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY 70-77 (1996).**

61. **THE WALL STREET JOURNAL (July 23, 2001).**

62. **Byron Johnson, *Objective Hope: Assessing the Effectiveness of Faith-Based Organizations: A Review of the Literature* (Center for Research on Religion and Urban Civil Society at Univ. of Penn., 2002).**